been paid the appellants remain the legal owner of the property and all profits from the property rightly belong to the appellants. Although the agreement was silent on this, the appellants argued that under section 15 of the Civil Law Act, 1956 the respondents were accountable to the appellants for the benefit arising out of the renting of the six bungalows. Hence, on the principles of unjust enrichment the parties should be placed in the same position as if the agreement had not been frustrated. The appellants alleged that the respondents rented the six bungalows through Sacon Construction Sdn. Bhd.

In answer the respondents maintained that section 15 of the Civil Law Act, 1956 did not apply and that the principles of unjust enrichment as claimed by the appellants could not succeed. First, the terms of the agreement, particularly clause 8(a), are clear in that only monies received under the agreement are to be refunded. Secondly, the respondents did not enter into any arrangement with E.D. Zublin A.G. in respect of the six bungalows. Thirdly, Sacon Construction Sdn Bhd. is a separate entity even though one director is also the director of respondents. On the particular facts, the learned Judge quite rightly refused to hold that there was a nexus between Sacon Construction Sdn. Bhd. and the respondents to justify the court in lifting the corporate veil. As long as the respondents comply with the terms of the agreement the appellants could not complain against the respondents for the use of the property.

Having heard the parties the learned Judge granted the respondents' application and ordered the appellants' counterclaim to be struck out. The court entered judgment for the respondents in the sum of $190,000 with interest at 8% per annum from date of judgment to date of realisation and costs. The learned Judge stated at page 17 of the Appeal Record:

". . . . Apart from interpreting what was within the four corners of the agreement to the Court's mind what was more fair than that the Respondents be refunded their money exclusive of any interest from the date of agreement (being interest not also provided for under the agreement) and the *quid pro quo* for it Appellants had the free use of the Respondents' money during that period while the Respondents had use of the six bungalows during the same period and up to this judgment. All the claim about the Respondents' having to account to the Appellants for having received rents or not having received it the Court dismissed as being irrelevant as not having been provided for under the agreement. . . . ".

Although the question of unjust enrichment was argued in the court below and here, a careful perusal of the pleadings did not show that this was properly pleaded. No objection was taken by the respondents on this as the respondents' counsel referred to unjust enrichment in his affidavit. If we had been fully aware at the outset of all the circumstances we would not have allowed the appellants to raise the issue after abandoning the ground of constructive trust. It was after the hearing and preparing our judgment that we looked carefully at the pleadings that we realised how scanty, through no fault of the appellants, were the materials on which such an issue could be raised. Nevertheless, we do not think the learned Judge had come to the wrong conclusion when he stated that unjust enrichment was irrelevant in the light of the facts of the case

Out of respect to the parties we decided to deal with their submissions. However, we decided not to go further into the meaning of unjust enrichment as a principle of liability as the appellants' claim however phrased must fail in this case.

We would dismiss the appeal with costs to the respondents. The deposit to the respondents on account of taxed costs.

Appeal dismissed.

Solicitors: *Shelley Yap Leong Tseu Chong Chia & Co.; Lee & Co.*

ENG NGAK HUA & ORS. v. AHMAD NORDIN BIN HAJI MAZLAN & ANOR.

[O.C.J. (Siti Norma Yaakob J.) April 25, 1984]

[Kuala Lumpur – Civil Suit No. P.61 of 1983]

Road Traffic – Oncoming car colliding into unlighted stationary lorry – Whether defendants negligent or alternatively nuisance.

Damages – Quantum – Motor accident – Two injured and one deceased – Second plaintiff and deceased's dependants innocent – Principles in assessing quantum.

At 12.30 a.m. on June 29, 1982, an accident occurred between a car driven by the first plaintiff and an unlighted stationary lorry, BM 2093, under the first defendant's control and belonging to the second defendant. The lights and engine of the lorry had malfunctioned whilst the first defendant was driving it along a straight stretch of road of 700-800 feet. The first defendant then parked the lorry on the correct half of the road in order to repair it but left no room for two cars to pass each other safely. The first plaintiff, unaware of its presence, ploughed right into the

rear of the lorry, resulting in injuries to himself and the second plaintiff and the death of the deceased. The second plaintiff suffered cerebral concussion and two lacerations measuring 8 c.m. and 4 c.m. on the right frontal region of his scalp and right supra-pubic region.

In this action therefore, the first and second plaintiffs claimed damages for injuries sustained and the third to eighth plaintiffs, as dependants of the deceased, claimed that by leaving the lorry parked without any rear lights on the road which had no lighting and without giving due warning to approaching traffic of its presence, the defendants were guilty of negligence or alternatively of nuisance. General and special damages for the first plaintiff have been agreed at $9,000 and $2,120 respectively based on 100% liability.

Held: (1) since fault could not be established, the claim on nuisance would not lie as the defendants were not responsible for creating the danger in the first place. In this case, the danger was forced on them;

(2) from the facts and circumstances of this case, the accident was caused by the first plaintiff who did not keep a proper look-out and the first defendant who failed to take the necessary steps to warn the first plaintiff of the presence of his unlit stationary lorry. That being the case, both were equally to blame for this accident and liability was apportioned 50:50;

(3) although liability has been apportioned between the first plaintiff and the defendants, this does not mean that it could be extended to the second plaintiff and the deceased's dependants, the innocent victims to this accident. As far as their claims were concerned, they were entitled to recover the whole of their damages awarded in this case;

(4)(a) the first plaintiff was awarded general damages in the sum of $4,500 and interest at the rate of 6% per annum from date of service of writ to date hereof, $1,060 special damages, interest at the rate of 3% per annum from date of accident to the date of judgment;

(b) the second plaintiff was awarded general damages in the sum of $4,000 and interest at the rate of 6% per annum from date of service of writ to date hereof, $690 special damages and interest at the rate of 3% per annum from date of accident to date of judgment;

(c) the third, fourth, fifth, sixth, seventh and eighth plaintiffs should be awarded the sum of $152,102 being the dependency claim, interest at the rate of 3% per annum on $16,800 from date of accident until date of judgment;

(d) the third plaintiff was awarded the agreed sum of $2,000 as funeral expenses, interest at the rate of 3% per annum from date of accident to date of judgment;

(e) costs to the plaintiffs.

Cases referred to:

(1) *Maitland* v. *R.T. & J. Raisbeck & Hewitt Ltd.* [1944] 2 All E.R. 272.
(2) *Parish* v. *Judd* [1960] 3 All E.R. 33.
(3) *Dymond* v. *Pearce & Ors.* [1972] 1 All E.R. 1142.
(4) *Hill-Venning* v. *Beszant* [1950] 2 All E.R. 1151.
(5) *Oli Mohamed* v. *Keith Murphy & Anor.* [1969] 2 M.L.J. 244.

A CIVIL SUIT.

M.T. Segaram for the plaintiffs.
Manjeet Singh Dhillon for the defendants.

Cur. Adv. Vult.

B **Siti Norma Yaakob J.**: One life was lost and two other persons were injured in this accident that occurred near Simpang Lima on the Kuala Selangor/Sabak Bernam trunk road at 12.30 a.m. on June 29, 1982, between a car driven by the first plaintiff and an unlighted stationary lorry C with a maximum permissible weight of 8 tons which was under the control of the first defendant. The first plaintiff had, as his passenger, the second plaintiff who was seated directly behind him in the back seat and the deceased who was seated next to him in the front. All three had left Kelang D at about 11.00 p.m. that night on their way to their homes in Sungai Besar after having transacted some business there.

At about the same time too, the first defendant was leaving Sekinchan for Sungai Besar in his E lorry, BM 2093 which belonged to the second defendant and which was fully laden with padi; seated next to him was his attendant. On arrival at Simpang Lima which is a straight stretch for about 700 to 800 feet, the lights of the lorry malfunctioned as did the engine, forcing the first defendant to leave the lorry parked right in the F middle of the road and occupying its correct half of the road with its nearside front and rear tyres only 8 inches from the left edge of the road and its off-side front and rear tyres only 6 inches from the centre white line; leaving no room at all G for two cars to pass each other safely and clearly it was an obstruction to traffic coming from the same direction as the first plaintiff.

It was whilst so parked that the first plaintiff arrived at the scene and, unaware of its presence, H he ploughed right into the rear of the lorry thereby causing the death of the deceased and injuring the second plaintiff and himself. The present action is brought by the first and second plaintiffs to recover damages for the injuries they sustained and by the third to the eighth plaintiffs as dependants I of the deceased. They claim that by leaving the lorry parked without any rear lights on the road which had no lighting and without giving due warning to approaching traffic of its presence, the defendants are guilty of negligence or alternatively of nuisance.

The first plaintiff, P.W. 5, testified that before the impact, he was driving at about 50 m.p.h. and ahead of him at a distance of about 100 to 200 feet away, he saw the strong lights of an oncoming lorry. Although the strong lights blinded him, he did not stop but instead reduced his speed and dimmed his own headlamps to warn the lorry driver to do likewise. The lorry driver however ignored the hint but proceeded on and passed the plaintiffs' car safely. It was only after this that the first plaintiff perceived the presence of the defendants' lorry on his side of the road but by that time it was too late to take any evasive action and he smashed right into the rear of the parked lorry and the impact caused the back portion of his car to be turned at an angle as shown in AB 5.

The second plaintiff, P.W. 7, corroborated P.W.5's evidence on all material particulars and both confirmed that the parked lorry had no rear lights, they did not see any reflectorised safety triangle on the road or the attendant flashing a torchlight at the rear of the lorry.

The driver of the lorry, D.W.2, on the other hand testified that before he left Skinchan at about 11.00 p.m. that night, he checked all the lights of the lorry and found them to be in working condition. However, after 40 miles of driving, the lights suddenly went off and upon investigation, he found that some wires had got burnt. At about the same time, the engine also stalled and he attributed the cause of this to the inability of the diesel to flow to the engine, a fault which was in no way connected with the burnt wires. Although there was a side table, he chose not to drive the lorry to it as the ground was wet and he was afraid that his overladen lorry would overturn in the soft ground. He left the lorry parked as it was practically on the entire part of its side of the road. However, realising that it was an obstruction, he placed the reflectorised safety triangle which he is required, by law to carry in his lorry, 150 feet away from the rear of the lorry and also had the attendant at the rear of the lorry flashing a torchlight to give advance warning of the stationary lorry to vehicles approaching from the rear. After having done that, he went to the front of the lorry and tried to repair the wires and it was whilst he was so engaged that he heard the sound of the plaintiff's car smashing into the rear of the lorry.

The officer who did the initial investigations into this case, D.W.1, confirmed there were no street lamps at the scene of the accident and he corroborated D.W.2's evidence that the side table was wet and soft and that he found the reflectorised safety triangle broken and the broken fragments form part of other broken fragments found on the road immediately to the rear of the lorry as shown on the sketch plan, AB3.

On the question of liability, I shall first of all consider whether the plaintiffs' action can be founded on the tort of nuisance. The law as to what constitute a nuisance is well illustrated in the following three cases: *Maitland* v. *R.T. & J. Raisbeck & Hewitt Ltd.*[1] *Parish* v. *Judd*[2]; and *Dymond* v. *Pearce & Ors.*[3]

In *Maitland's* case, Lord Greene M.R. enunciated the law as follows:

> "Every person who uses the highway has to exercise due and proper care. He has a right to use the highway and, if something happens to him which in fact causes an obstruction to the highway but is in no way referable to his fault, it is quite impossible, in my view, to say that *ipso facto* and immediately a nuisance is created. It would be obviously created if he allows it to be an obstruction for an unreasonable time or in unreasonable circumstances, but the mere fact that it has become an obstruction cannot turn it into a nuisance. It must depend on the facts of each case whether or not a nuisance is created. If that were not so, it seems to me that every driver of a vehicle on the road would be turned into an insurer in respect of latent defects in his own machine."

This enunciation of the law was followed by Edmund Davies J. in *Parish's* case where His Lordship stated that:

> "The mere fact that an unlighted vehicle is found at night on a road is not, in my judgment, sufficient to constitute a nuisance. First, in order that a nuisance may be constituted, it must be shown not merely that the vehicle was an obstruction on the road but that it was a danger on the road. Secondly, in order that, if it be a nuisance, it may be an actionable nuisance, it must be shown either that the vehicle became unlighted by reason of some fault on the part of the person responsible for the vehicle, or that, assuming that it initially became unlit without any fault on the part of the person responsible for the car, nevertheless he thereafter was guilty of some fault."

In *Dymond's* case, the same judge went further to explain that fault is implicit and liability incontestable if the nuisance has been deliberately created giving rise to danger to road users.

Applying the above tests to the facts of the case before me, I ask myself the following questions. Why did the defendants' lorry become unlighted in the first place and why did the engine stall? Was it due to D.W.2's fault? D.W.2 has explained that before leaving Sekinchan that night, he had checked the lights of the lorry and found them to be in proper and there was no indication

that they might malfunction. Although he had experienced the same problem once before, he had had the lights repaired since and had been using the lights for his night driving without any problem for one month before this accident. The fact that the wires got burnt again could not be held against him as he is not a mechanic who could have detected the probability of the same problem recurring again and as such it was not his fault when the lights went out. Again there was independent testimony from D.W.1 that, unlike P.W.5's car, the lorry could not be driven away from the scene of the accident the same night and he had to wait for daylight before he could get a crane to tow it to the police station. All these point to the fact that the engine of the lorry had also malfunctioned, a factor which could not possibly have been anticipated by D.W.2 as likely to happen as it was most unlikely that he would want to be caught stranded in the middle of the night on a lonely and dark road. Since fault could not be established, the claim on nuisance will not lie as the defendants were not responsible for creating the danger in the first place. In this case, the danger was forced on them.

Turning to the claim for negligence, the law on this is well stated by Denning L.J. in the case of *Hill-Venning* v. *Beszant*[4] as follows:

"The presence of an unlighted vehicle in a road is *prima facie* evidence of negligence on the part of the driver, and it is for him to explain how it came to be unlighted and why he could not move it out of the way or give warning to oncoming traffic."

In the same case, Cohen L.J. further explained that what is reasonable to do must depend on the circumstances of each case. Thus to rebut the presumption of negligence raised against him, D.W.2 must show that he had done all that is reasonably necessary and expected of him to warn approaching vehicles of the obstruction caused by his unlit lorry parked on the dark road. As I have already stated above, the cause of the lights suddenly going off and the failure of the engine are no fault of D.W.2 and in this respect and contrary to the plaintiffs' objection, I do not consider it necessary for D.W.2 to adduce any evidence on the maintenance of the lorry. If the plaintiffs had really required this evidence, they could easily have obtained that independent testimony from the Registrar and Inspector of Motor Vehicles who examined the lorry after the accident and who had reported to his findings. D.W.1 who was subpoenaed by the plaintiffs originally, confirmed that the lorry was so examined but he did not have such a report in his possession and this may well be due to the fact that he had already retired from the Police Force but this should not have prevented the plaintiffs from obtaining the report and satisfying themselves as to the causes of the failure to the lorry's lighting system and engine and which I am sure, would be disclosed by such a report. Since they have not done so, I am only left to decide on facts adduced before me at the trial.

Realising that the lorry was an obstruction, D.W.2 had placed a reflectorised safety triangle 150 feet away from the rear of the lorry. The fact that there was a reflectorised safety triangle at the scene cannot be doubted as D.W.1 saw fragments of it together with the other fragments of glass and metal at the rear of the lorry. What was disputed by the plaintiffs was that it could not have been at the distance of the statutory requirement of 150 feet away from the rear of the lorry as the broken pieces were found too close to the lorry. In this respect, I have also to consider P.W.5's manner in driving his car. According to him, as he was proceeding at about 50 m.p.h. and was blinded by the lights of the oncoming lorry, he had slowed down, dimmed to his own head lamps but did nothing else. Even though the road was illuminated by the strong lights of the oncoming lorry as well as by the head lamps of his own car, he was unable to perceive the presence of the defendants' lorry on the road until it was too late. This can only mean that he must have been speeding and had not kept a proper lookout. My finding on this is based on the following facts. As it was already past midnight and there was no speed limit imposed in that area, in all probability, P.W.5 must have been speeding to get home and that he was driving more than 50 m.p.h. than he dared to admit. There was no telltale mark on the road to show that he had braked and on his own admission, he only slowed down after he was blinded, dimmed his own head lamps and did nothing else. Even assuming for one moment that the reflectorised safety triangle was placed at the distance less than 150 feet from the rear of the lorry, he did not even see it at that distance and this can only mean that he was driving too fast and did not keep a proper look-out. Another evidence of speed is the extent of the damage to the motor car which is very extensive as can be seen from the photograph, AB 6E. Thus driving at a speed of more than 50 m.p.h., he must have knocked the reflectorised safety triangle down, hurled it forward to leave its broken pieces along with the other broken fragments at the rear of the lorry. As a long distance lorry driver whose work entails

driving mostly at night, it is most unlikely that D.W.2 could have risked placing the reflectorised safety triangle at a distance less than 150 feet from the rear of the lorry and to that extent, I accept his evidence that he had placed the triangle at the required statutory distance.

I also accept D.W.2's explanation that he could not risk parking the lorry at the side table as he feared that his heavy laden lorry would overturn in the soft ground. I found corroborative evidence of this from D.W.1 and from the documentory exhibits. D.W.1 had testified that although he could not recall whether it rained during the day, he found the side table damp and the ground soft. From the photographs exhibited, the parked lorry hardly budged on impact whereas it pushed the back portion of P.W.5's car at an angle, thus tending to show that the lorry was too heavy to be pushed forward even on impact.

I now come to the other action taken by D.W.2 to minimise the danger which his parked unlit lorry had caused and that is the presence of his attendant, D.W.3, at the rear of the lorry, flashing a torchlight to warn traffic of the presence of the lorry. It is not disputed that D.W.2 carried only one torchlight in his lorry and there was evidence from D.W.3 that it was impossible for D.W.2 to carry any repair work at the front of the lorry without the aid of some light as there were no street lamps and the area was very dark. Yet D.W.2 insisted that he was able to do so without the aid of any light. Then again there was a very material inconsistency in their evidence when they testified as to the time D.W.2 took trying to repair the burnt wires. According to D.W.2, he tried to do so for 10 minutes whilst D.W.3 testified that D.W.2 was all the time at the front of the lorry repairing the wires and this took about one hour. Reflecting on D.W.2's earlier evidence, he had testified that he left Sekinchan at about 11.00 p.m. and after about 40 minutes of driving, the lights of the lorry suddenly went off and the engine refused to start. Thus, he would have reached the accident area round about midnight and since the accident happened at about 12.30 a.m., D.W.3's evidence as to the time taken by D.W.2 to mend the wires would be the more approximate and probable time that D.W.2 took to tend to all the necessary repair work. In this respect, it is hardly improbable that D.W.2 would be able to do any form of repair work for about one hour without the aid of any lights and yet according to D.W.3, he was at the front of the lorry all the time and that he was still there at the time of the accident and neither P.W.5 nor P.W.7 saw anybody flashing a torchlight at the rear of the lorry. The sum total of all these evidence is that in all probability, D.W.3 could not have been flashing the torchlight from the rear of the lorry as D.W.2 must have been using it to assist him in the repair work he was doing at the front of the lorry. From this it follows that D.W.2 had not taken all steps necessary to warn approaching vehicles of the presence of his parked lorry and to that extent, he has not rebutted the presumption of negligence. However, when considering the extent of his liability, I have to take into account the conduct of P.W.5 in driving his car. As I have already held above, he was taking unnecessary risks in driving his motor car well beyond 50 m.p.h. and since he did not keep a proper look-out, he must also bear some part of the blame for this unfortunate accident. From the facts and the circumstances of this case, the cause of this accident was due on the part of P.W.5 for not keeping a proper look-out and on the part of D.W.2 for failing to take the necessary steps to warn P.W.5 of the presence of his unlit stationary lorry. That being the case, I hold that both are equally to blame for this accident and to that extent, I apportion liability at 50:50.

Although the liability has been apportioned between the first plaintiff and the defendants, this does not mean, following the decision of *Oli Mohamed* v. *Keith Murphy & Anor.*[5], that it can be extended to P.W.7 and the deceased's dependants, the innocent victims to this accident. As far as their claims are concerned, they are entitled to recover the whole of their damages awarded in this case.

Since general and special damages for the first plaintiff have been agreed at $9,000 and $2,120 respectively based on 100% liability, these amounts will accordingly be halved, following my finding as to his share of the blame.

The second plaintiff suffered cerebral concussion and two lacerations measuring 8 cm. and 4 cm. on the right frontal region of his scalp and right supra-pubic region. He was warded initially at the General Hospital, Kelang, but after his discharge, when he experienced severe headaches and giddiness, he sought medical treatment at the General Hospital, Kuala Lumpur, where he was treated as an outpatient for two weeks. Presently he claims that although the headaches have improved as they do not come too frequently, they still persist but there was no medical evidence to

support this. For his injuries, based on 100% liability, I award a sum of $4,000 by way of general damages. For special damages he has claimed:

(1) a sum of $40 being fees paid for his medical report which is not disputed by the defendants and which is allowed;

(2) a sum of $60 as damages to clothing. As there was no proof of this, I disallow this claim;

(3) a sum of $100/ as travelling expenses for which I allow only $50;

(4) a sum of $4,800 being loss of 6 months' income as a boat repairer at $800 per month. I have only P.W. 7's words that he earned $800 per month as a boat repairer and that he was incapacitated for 6 months. As with evidence of earnings, plaintiffs do tend to inflate the figures of their earnings and since in this case there was no supporting evidence, I consider a sum of $600/ as being a more reasonable figure and grant him a period of 1 month as total incapacitation. So for loss of earnings alone, I award the second plaintiff a sum of $600; and

(5) a sum of $200 as extra nourishment and food. As this does not necessarily arise, I disallow this claim.

On the whole then, I award the second plaintiff $690 by way of special damages.

Coming to the dependancy claim, the dependants of the deceased are the third to the eighth plaintiffs and they are his widow, his three infant children aged 5, 4 and 2 and his parents aged 52 and 50 at the time of death. The deceased was 25 years old then and he earned a livelihood as a butcher, earning an average of $1,800 a month out of which he contributed $1,400 for the upkeep of his family and parents. As with most cases of this nature, there was no satisfactory proof of earnings and I had only the widow's testimony on this. Bearing in mind the deceased's station in life, the needs of his young family and aged parents, I consider a sum of $800 per month would be sufficient to maintain a family of six people. Up to the date of trial, there has been a lapse of 1 year and 9 months since the accident and for the pretrial period, the dependency loss is calculated at 21 x $800 = $16,800. Being a self-employed man, I would expect the deceased to work until 65 years old and so he would still have at least another 38 years of working life. Taking 1/3 away for contingency, I would give him another 25 years of purchase and for this period at the rate of $800 per month, the Annuity Table comes out with a figure of $135,302 (to the nearest dollar).

The widow of the deceased, who is the third plaintiff also claims funeral expenses which has been agreed between the parties to be at $2,000.

On the whole then, there will be judgments:

(1) to the 1st plaintiff in the sum of $4,500 general damages, interest at the rate of 6% per annum from date of service of writ to date hereof, $1,060 special damages, interest at the rate of 3% per annum from date of accident to date hereof;

(2) to the 2nd plaintiff the sum of $4,000 general damages, interest at the rate of 6% per annum from date of service of writ to date hereof, $690 special damages, interest at the rate of 3% per annum from date of accident to date hereof;

(3) to the third, fourth, fifth, sixth, seventh and eighth plaintiffs in the sum of $152,102 being the dependency claim, interest at the rate of 3% per annum on $16,800 from date of accident until date hereof;

(4) to the third plaintiff for the agreed sum of $2,000 as funeral expenses, interest at the rate of 3% per annum from date of accident to date hereof; and

(5) costs to the plaintiffs.

Order accordingly.

Solicitors: *M. Segaram & Co.; Lawrence Dhillon & Associates.*

KATHAVARAYAN v. NG SUP MOI & ANOR.

[O.C.J. (Siti Norma Yaakob J.) August 19, 1985]

[Kuala Lumpur – Civil Suit No. P. 192 of 1980]

Medical profession – Negligence – Lack of medical care and attention – Patient's leg in plaster of paris – Constriction of blood vessels – Volkmann's Ischemia – Amputation.

Professional Negligence – Lack of medical care and attention – Claim for damages – Leg covered with plaster of paris – Constriction of blood vessels – Volkmann's Ischemia set in – Amputation – $53,500 awarded as general damages.